U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 565-5330
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DATE: April 3, 2000
CASE NO.: 2000 - INA - 10

In the Matter of:
ALICE SIEGAL,
Employer,

on behalf of

HELENA WOJTYRA,
Alien.

Appearance: Tadeusz Kucharski
Brooklyn, NY

Certifying Officer: Dolores DeHaan
New York, NY

Before: Holmes, Vittone, and Wood

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Helena Wojtyra ("Alien") filed by Employer Alice Siegal ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Naturalization Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. § 656. The Certifying Officer ("CO") of the United States Department of Labor, New York City, New York, denied the application, and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that 1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor, and 2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly

employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. § 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c). All parties were served with a Notice of Docketing and Order Requiring Statement of Position or Legal Brief on February 4, 2000; they were notified that all parties had twenty-one (21) days to submit a statement or brief, and such was required if a grounds of appeal was not stated in the request for review by the Board of Alien Labor Certification Appeals (the "Board").

Statement of the Facts

On November 9, 1996, Employer filed an application to permit her to fill the position of "Cook, Household, Live out" in her Scarsdale, New York home. The application, after amendment, described the position as follows:

> "Prepare and cook Jewish Kosher foods including: Cholent, Gefilte Fish, pacha, Knishes, Shishlik, Falafel, Blintzes, Tahini, Babaganooi, Israeli salads, Knedlah, Matzo Balls, Borscht, Bake Mandel Bread. Decorate dishes according to the nature of the celebration, Purchase foodstuff, Clean Kitchen."

The schedule for the cook was listed as noon to eight p.m., Tuesday through Saturday, and the position paid $12.81 per hour. (AF 4).

The Employer advertised the position as required by law, but no responses were obtained. Employer submitted a letter along with the recruitment results explaining briefly that the cook would prepare three meals a day, plus two meals for a son on weight reduction diet. The cook was needed because of Employer's work load. The case was transmitted to the CO on July 25, 1997, with the comment that the position did not appear to be full time. (AF 5-25).

On June 8, 1999, a Notice of Findings ("NOF") was issued which proposed to deny the application on two grounds. First, the CO cited a violation of 20 C.F.R. § 656.20(c)(8), which requires that the position be clearly open to qualified U.S. workers. Specifically, the CO questioned whether this was a *bona fide* position, or had been created merely for the Alien. The Employer was requested to submit responses and documentation in support thereof to twelve inquiries. These items involved family schedules, cook duties, special dietary requirements, and

household income. Second, the CO found a violation of § 656.21(b)(2), which requires that the job requirements, unless arising from business necessity, are those normally required for the advertised position. Employer's requirement of two years experience in preparing Kosher style cooking was in excess of the DOT requirements, and Employer was instructed to either establish a business necessity or delete the requirement. To establish a business necessity, Employer was directed to show that the experience was required to perform the duties, why training could not be given, and that either the job previously existed or a major change in the household required the creation of the position. Employer was cautioned that mere responses might not meet her burden of proof; documentation was required. (AF 26-30).

A Rebuttal, dated June 23, 1999, was filed by Employer. This consisted of a cover letter responding to each of the CO's inquiries, a copy of Employer's 1996 tax return, and a detailed entertainment schedule for the prior twelve months. The cover letter also addressed the business necessity of a household cook. Specifically, Employer stated that she had been required to stop doing the cooking and devote more time to her educational business, and both she and her husband had been raised in homes where "Jewish tradition was treated seriously." Moreover, Employer stated that she frequently entertained Jewish business guests, who were dismayed by the quality of Kosher food at restaurants Employer took them to. Restaurants and caterers were inadequate. No one in the household could provide training in Kosher cooking. (AF 31-57).

Apparently, counsel for Employer submitted requests for extensions of time for Rebuttal in a number of cases on July 14, 1999, the day after the Rebuttal period closed in the case at bar. He urged that because of delays in serving him with the NOFs, and vacations taken by employers, an extension be granted. Handwritten notes on the letters indicate that extensions were granted in unspecified individual cases until approximately September 13, 1999. (AF 62-65).

A Final Determination ("FD") was issued on August 20, 1999. The CO found that the violation of § 656.20(c)(8) had been rebutted, and that the position was *bona fide*. However, she also found that a business necessity had not been proven and therefore denied the application based upon a violation of § 656.21(b)(2). The Employer had failed to show that a person without Kosher cooking experience, but with experience as a cook, could not perform the job duties. (AF 59-60).

Employer protested the denial by letter of August 25, 1999, stating that it was issued before the expiration of the extended rebuttal period. Employer submitted additional Rebuttal with the protest, stating that business clients dissatisfied with Kosher foods served at a restaurant had failed to close deals and had cost Employer approximately $150,000. (AF 68-70).

The CO apparently responded by a letter of September 10, 1999, which does not appear in the file. However, the Employer did submit a letter of September 15, 1999 protesting the lack of action on her prior complaint regarding the issuance of an FD. A handwritten note by the CO which mentions the missing correspondence instructs the Employer to comply with the FD's instructions on appeals to the Board. (AF 66-67).

A Request for Review was filed on November 30, 1999, stating as grounds a typographical error by the CO, in which she referenced Polish cooking instead of Kosher; error in not crediting the statements of business necessity in the first rebuttal; error in not considering the second rebuttal information; and misreading of the experience requirement to include the Kosher style. (AF 69-77).

Discussion

The typographical error referred to by the Employer is contained in NOF at AF 27. "The job duty of preparing Polish Style food is not being questioned....The requirement that is determined to be unduly restrictive is that the applicant have specialized experience in preparing Polish Style food." However, the detailed instructions on how to rebut the finding refer to Kosher cooking. We find that the typographical error is harmless. Not only did the NOF clearly refer to Kosher cooking, the Employer understood that it was a Kosher cooking requirement, and not a Polish cooking requirement, which was at issue. In Rebuttal, the Employer pointed out that Polish cooking was not a requirement, and addressed solely the business necessity of Kosher cooking. We find that the NOF was adequately clear, and provided Employer with notice of the deficiency and opportunity to address that deficiency.

We find that the bare assertions made by Employer in the first Rebuttal of June 23, 1999 do not establish a business necessity. Bare assertions are not sufficient to meet the Employer's burden of proof. Inter-World Immigration Service, 1988-INA-490 (Sept. 1, 1989), *citing* Tri-P's Corp., 1988-INA-686 (Feb. 17, 1989). Further, the first statement, that both Employer and her husband were raised in Jewish Kosher homes, concerns a personal preference that is not related to business. Significantly, Employer does not assert that her own household keeps Kosher. Similarly, the second statement, relating to her Jewish business guests appreciating Jewish Kosher cuisine, does not indicate that these guests require Kosher food. Moreover, the statements fail to show why serving Kosher foods prepared by caterers or restaurants would be harmful to the business. No evidence is submitted in support of that assertion, and it fails to address the question of why a regularly trained cook could not prepare Kosher style foods.

The second rebuttal does provide additional documentation of the harm to the business, by citing an example of dissatisfied clients failing to close a business deal, or even discuss business, following a disappointing meal. Further, the second Rebuttal notes the experience held by three cooks who prepared those meals; all are less than the two years Employer requires. However, this evidence was submitted following the FD, and was not considered by the CO in making her decision. We therefore cannot consider it. 20 C.F.R. § 656.26(b)(4); 20 C.F.R. § 656.27(c).

We find that this is not a situation in which the Employer did not have an opportunity to submit the information, and was therefore denied due process. The requests for extension contained in the file reference numerous cases, and were in fact made after the Rebuttal period in this case had expired. We find that no extension was requested in this case. Employer's counsel himself states that he cannot match his requests and the handwritten grants to specific cases. (AF

66-67). Further, the letters requesting extensions are dated July 14, 1999, and state that the NOFs in the cases they concerned had just been received. The first Rebuttal in this case, however, was filed on June 23, 1999. Clearly, the NOF had been received and responded to before the requests for extension were filed. The Employer was not denied an opportunity to properly respond to the deficiencies noted in the NOF. Moreover, the information contained in the second rebuttal could easily have been included in the first. Employer merely neglected to be specific, although she had been cautioned to be complete in her answers by the NOF.

Even assuming arguendo that the second rebuttal should be considered, we find that it fails to meet the Employer's burden of proof as well because it, too, consists merely of bare assertions of fact. Although these assertions are quite detailed as regards the experience of the cooks in question and the amounts of money lost, no source for the information is presented, such as the name of the restaurant(s) involved, the clients, or dates.

Order

For the foregoing reasons, the Final Determination of the Certifying Officer is affirmed, and labor certification is denied.

For the Panel:

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John C. Holmes
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure and maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five

double-spaced typewritten pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon granting of the petition the Board may order briefs.